Date: July 31, 1997

Case No.: 95-INA-00541

In the Matter of:

MARY NEGOWETTI,
Employer

On Behalf Of:

HENRYKA KLIM,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On December 20, 1993, Mary Negowetti ("Employer") filed an application for labor certification to enable Henryka Klim ("Alien") to fill the position of Family Dinner Service Specialist, Live-out (AF 12-13). The job duties for the position are:

> Plans menus and cooks meals according to recipes. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. Serves meals. Performs seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies.

The requirements for the position are eight years of grade school and two years of experience in the job offered.

The CO issued a Notice of Findings on March 2, 1995 (AF 28-30), proposing to deny certification on the grounds that it does not appear feasible that the stated duties constitute full-time employment in the context of the Employer's household. The CO advised the Employer to establish that the job offer meets the definition of "employment" as stated in the regulations at 20 C.F.R. § 656.50 (now recodified as § 656.3) by providing evidence which clearly establishes that the position, as performed in the Employer's household, constitutes full-time employment.

Accordingly, the Employer was notified that it had until April 6, 1995, to rebut the findings or to cure the defects noted.

In her rebuttal, dated March 21, 1995, and submitted under cover letter dated April 4, 1995 (AF 31-43), the Employer contended that her household consists of her husband, her four children, her mother, and herself, and that in addition to preparing meals for her household, the cook will also prepare meals for three to five business guests, three times per week. The Employer included in her rebuttal a schedule of the number of meals prepared on a daily and weekly basis. The Employer stated that the cook will be required to prepare a total of 35 breakfasts, 15 lunches, 20 afternoon meals, 35 dinners, and about 80 snacks weekly for her family members, and will also prepare between 12 and 18 dinners for business guests weekly. The Employer further stated that she and her husband have been entertaining business guests three times per week for the past two years on Mondays, Wednesdays, and Fridays, and she listed the dates in 1993. The Employer also included a letter from Rt. 130 Deli, which states that she has

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

been a customer of the Deli for the past two years, which has provided "catering and platters" for her approximately three to four times per week.

Next, the Employer contended that the cook will not be required to perform any duties other than cooking and cooking-related duties, and that there will be no overtime hours. The Employer stated that until this time, her Mother has been able to help with the cooking and she also takes care of the children, but she is unable to continue doing the cooking due to her health. The Employer included a letter from her Mother to this effect, and a letter from her Mother's physician. The Employer included a list of the school schedules of her four children. The Employer stated that she performs the cleaning and maintenance duties in her home with the help of her older children on the weekends.

The Employer concluded by stating that, "[o]ur full-time employment is permanent. My husband and I are committed to our professions for life time. Our offer for the position of the cook, live-out in our household is full-time and permanent. Financially we are able to pay the prevailing rate of pay."

The CO issued the Final Determination on April 10, 1995 (AF 44-46), denying certification because she did not find the Employer's documentation and evidence persuasive in establishing that the job duties, as stated, constitute full-time employment. The CO stated that,

> The central issue is whether the job duties, **as they are written and stand alone**, constitute full-time, eight hour per day, five day per week employment rather than an attempt to qualify the alien under the skilled worker category due to the unavailability of visa numbers in the unskilled worker category. (Emphasis in original.)

The CO further determined that the Employer's schedule for the cook appears to be unrealistic. Also, the CO stated that the Employer did not comply with the request to provide an entertainment schedule for the preceding 12 months, as the Employer "merely lists a series of dates and provides none of the other information required to help document this 'entertainment' schedule." The CO referred to the letter from the Deli, but questioned whether all of the "platters" were related to personal home business entertainment.

Lastly, regarding the Employer's Mother, the CO stated that the Employer has failed to show that her Mother was performing strictly cooking-related duties eight hours per day, five days per week, since the Mother, herself, stated in a letter that she has been performing the cooking and also has been caring for her four grandchildren at the same time.

The Employer requested review of the Denial of Labor Certification by letter dated May 2, 1995, submitted under cover letter dated May 8, 1995 (AF 47-60). On August 4, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On August 25, 1995, Counsel for the Employer submitted a Brief.

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 28-29). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, and how the children are cared for during the Alien's scheduled time off; and, (5) who will perform the general household maintenance duties such as cleaning, clothes washing, vacuuming, etc.

In her rebuttal, the Employer asserted that she works from 8:00 a.m. until 5:00 p.m. and her husband works from 9:00 a.m. until 5:30 p.m. (AF 42). In addition, the Employer stated that she has four children, three of which attend school from 8:00 a.m. until 3:00 p.m. and one of which attends school from 9:00 a.m. until 2:00 p.m. The Employer provided a typical menu, along with preparation time for each meal. In summary, the Alien would be required to prepare 35 breakfasts, 15 lunches, 20 afternoon meals, 35 dinners, and 80 snacks weekly for herself, her husband, her four children, and her mother. In addition, the Employer stated that the Alien will frequently be required to prepare meals for business guests. The Employer asserted that, for the past two years, she and her husband have entertained business guests three times per week. In support of this contention, the Employer listed the dates of entertainment and included a statement from a deli owner. The Employer further stated that her Mother previously performed the cooking duties, but cannot continue doing so due to poor health. Finally, the Employer asserted that she and her children perform the cleaning and maintenance duties during the weekend.

As indicated, the issue here is whether or not the CO's conclusion, that full-time employment is not being offered, is a reasonable inference from these facts. The Employer has indicated the conditions of employment on the Application for Alien Employment Certification

form ETA 750A, under penalty of perjury pursuant to 28 U.S.C. § 1746 (see 20 C.F.R. § 656.20(c)(9). These conditions of employment state that 40 hours of employment are being offered per week at a wage of $12.48 per hour. There is no evidence in the record to the contrary. Essentially, the dispute comes down to the Employer's assertion that preparation of a particular meal takes a certain amount of time, while the CO disagrees and says that the meal in question takes a lesser amount of time. The CO's conclusion that, in fact, the duties described could not constitute 40 hours of work, are speculative at best.

Therefore, we find that the CO's conclusion that full-time employment is not being offered is not supported by sufficient evidence. Further, in the absence of any evidence that this Employer is not credible, we find that this evidence is so compelling that no reasonable fact finder could find that full-time employment is not being offered. As no other objections to certification have been raised by the CO, the application for labor certification will be Granted.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED**, and this matter is REMANDED for issuance of Labor Certification.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the

petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

Dolores DeHaan, Certifying Officer
U.S. Department of Labor/ETA
201 Varick Street, Room 755
New York, NY 10014